UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 96-22204

THOMAS C. HICKS and
BEVERLY L. HICKS,

Debtors. **DECISION & ORDER**

BACKGROUND

Green Tree Credit Corp. ("Green Tree") has moved to be allowed to reargue the motion (the "Motion to Reopen"), filed by the "Debtors" on July 15, 1998, which requested that their Chapter 7 bankruptcy case be reopened. The Debtor's motion was granted by a July 16, 1998 Order (the "Reopening Order") that included certain findings and additional conditions imposed by the Court. Green Tree has asserted that there was not good cause to reopen the Debtor's Chapter 7 case, and it has requested that the Court vacate the Reopening Order.

The decision as to whether to reopen a case under Section 350(b)[1] of the Bankruptcy Code is in the discretion of the Bankruptcy Court.

This Court's practice and policy is to initially consider motions to reopen on an *ex parte* basis. However, it requires that the movant: (1) set forth in detail the additional actions it will take and any additional relief it will seek should the case be reopened; and (2) make a reasonable showing that any additional relief it might seek is available and appropriate. Should the Court feel that any such additional relief is not available or appropriate, the motion to reopen will be denied. In

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[1] Section 350(b) provides that:

> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

addition, based upon the facts and circumstances set forth in the Motion to Reopen, the Court always reserves the right to require that the motion to reopen be made on notice to one or more interested parties. This is especially true if the Court feels that such an interested party may be prejudiced by the reopening itself.[2]

In the Motion to Reopen, the Debtors indicated that: (1) in their bankruptcy schedules they had listed their residence as having a value of $98,000 and being subject to a mortgage in favor of Fleet Mortgage Group, Inc. ("Fleet"), with an unpaid balance of approximately $93,800, and a home improvement loan lien in favor of Green Tree with an unpaid balance of approximately $25,300; (2) in their bankruptcy schedules the obligation to Green Tree had not been listed as disputed, the Green Tree lien had not been listed as being subject to defenses, and no cause of action for a truth in lending violation (a "Truth-In-Lending Claim") against Green Tree or its assignor had been listed as an asset; (3) in January 1997, after the Debtors had obtained a discharge in November 1996, they first became aware that the mortgage which Green Tree alleged evidenced the lien on their residence was forged;[3] (4) in response to a Motion For Relief From The Stay (the "Stay Motion"), filed by Green Tree on April 20, 1997, the attorney for the Debtors advised the attorney for Green Tree, the Court, and the Chapter 7 Trustee that they had "legal and equitable defenses" to the mortgage, which they were not waiving by failing to oppose the Motion; (5) Green Tree's Stay Motion was granted

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[2] Outside of the Bankruptcy System there is often confusion about the affect and implications of a reopening. For example, a common misconception is that the automatic stay is reinstated when a case is reopened even if it had previously been modified or terminated by the Court to allow a creditor to proceed with a mortgage foreclosure.

[3] The case file includes a proof of claim that was filed by Green Tree on October 9, 1996. This proof of claim included a copy of the mortgage. However, there is no reason to believe that the Debtors or their bankruptcy attorney ever reviewed the claims filed in this case because it was ultimately determined to be a no asset case.

by a September 8, 1997 Order; (6) in September 1997, Green Tree commenced a mortgage foreclosure proceeding in the New York State Supreme Court (the "Mortgage Foreclosure Proceeding"); (7) on October 30, 1997, the Debtors Chapter 7 case was closed; (8) in a Motion for Summary Judgment in the Mortgage Foreclosure Proceeding, Green Tree had asserted that the Debtors' affirmative defenses, including a defense of forgery, and counterclaims, including a Truth-In-Lending Claim, (collectively the "Defenses and Claims") were not available to them because they had failed to schedule them in their bankruptcy proceeding before the case was closed; and (9) the Debtors wished to reopen their Chapter 7 case to amend their schedules to include the Defenses and Claims, in part to "overcome the objections raised by Green Tree" in the Mortgage Foreclosure Proceeding.

The Reopening Order: (1) required the Office of the U.S. Trustee to appoint a trustee; (2) required that a copy of the Reopening Order be served upon the attorneys for Green Tree; and (3) specifically provided that "allowing debtors to amend their schedules shall in no way be deemed to be an opinion of this Court that such amendments in any way affect the arguments of Green Tree Credit Corp. in the pending New York State proceeding involving the debtors." These insertions by the Court in the Reopening Order were made in order to: (1) insure that a trustee would be able to review whether the Debtors' Truth-In-Lending Claim could result in a positive recovery for the Debtors, rather than a mere offset to the obligation owed to Green Tree, which would make it an asset of the estate which the trustee might elect to administer for the benefit of creditors; (2) insure that the attorneys for Green Tree were made aware that the reopening of the Debtor's Chapter 7 case and any amendments made to their schedules would not effect Green Tree's arguments that the Debtors' Defenses and Claims were unavailable to them because they had not scheduled them before

their bankruptcy case was closed; their "judicial estoppel" arguments; and (3) indicate, in accordance with this Court's prior decision in *In re Tyler*, 166 B.R. 21 (1994) ("Tyler"), that it would remain for the State Court Justice in the Mortgage Foreclosure Proceeding to determine whether the Defenses and Claims asserted by the Debtors were available to them at the time that Green Tree's made its Motion for Summary Judgment.[4]

DISCUSSION AND DECISION

The motion of Green Tree to reargue the Motion to Reopen and to have the Court vacate the Reopening Order is denied.

The Debtors' Truth-In-Lending Claim is an asset of the bankruptcy estate which may be: (1) unavailable to either the Debtors or the Chapter 7 Trustee, depending upon the decision of the State Court Justice in the Mortgage Foreclosure Proceeding; (2) pursued by the Chapter 7 Trustee, either individually or under some agreement with the Debtors, or abandoned by him, should the State Court Justice determine that it is available.

This Court does not have exclusive jurisdiction to determine whether the failure of the Debtors to formally schedule the Defenses and Claims prior to the closing of their Chapter 7 case makes those Defenses and Claims unavailable to the Debtors or the Chapter 7 Trustee in the Mortgage Foreclosure Proceeding. Even if that determination were a federal question, which this

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[4] In *Tyler*, the Court indicated that when it modified or terminated the automatic stay provided by Section 362 to allow a party to commence or continue a pending state court mortgage foreclosure proceeding against the debtor's real property it was the Court's expectation that it had modified or terminated the stay for the completion of all related state court mortgage foreclosure proceedings. That expectation contemplates that the State Court Justice will resolve all issues in the Mortgage Foreclosure Proceeding which are within its jurisdiction, whether that jurisdiction is exclusive or concurrent with the Bankruptcy Court or any other federal court.

Court does not believe it is, the "Rooker Feldman Doctrine" and this Court's decision in *Tyler* make that determination one which now must be made by the State Court.

This Court reaffirms its decision when it reopened the Debtors' Chapter 7 case. It was appropriate in the Court's discretion to reopen the case in order to afford the Chapter 7 Trustee an opportunity to investigate whether the Truth-In-Lending Claim was a valuable asset which could be pursued, collected and administered for the benefit of creditors, while not prejudicing the rights of Green Tree.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: September 17, 1998